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ARTICLE

The Common Frame of Reference (CFR) and the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts

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Abstract At the beginning of 2008, the draft Common Frame of Reference (CFR) will be presented to the European Commission by the Joint Network on European Private Law. The author gives an overview of the manifold discussions that have been held as to the purpose, content and scope of the CFR. The main part of the article then explains in depth the recently published Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Both texts are very similar, as the Draft CFR is directly inspired by the Principles. The article focusses on the Principles and shows how the PEL CAFDC go much further than formulating a simple common terminology. It presents the general structure and content of the PEL CAFDC, then shows its relationship to other soft and hard law instruments and finally discusses some of the duties and obligations found in the PEL CAFDC/DCFR.

Keywords Common Frame of Reference · European Private Law · Principles of European Law · Commercial Agency, Franchise and Distribution Contracts

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This paper was presented at the conference *Towards a Common Frame of Reference: Principles of European Law*, organised by ERA and the Joint Network on European Private Law in Trier on 19–21 September 2007. Dedicated specifically to the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts, it does not present these Principles *in extenso*, as this task had been accomplished by Professor Hesselink during the conference. This paper aims solely at giving an outsider's view on the principles.

1. Introduction

1.1 The Common Frame of Reference (CFR)[1]

The Council of the European Union decided on 19–20 April 2007 to define a Council position on the fundamental aspects of a possible Common Frame of Reference (CFR) for European contract law.[2] This is just yet another step in the great European project aiming to build a common European contract law,[3] as the "EU legislator has realised that uniform substantive rules provide greater predictability than uniform choice-of-law rules",[4] even though the Community's competence in this field is still discussed.[5]

[1] Bibliography: Very many publications have been drafted on the development of a European Contract Law. It is of course not possible to refer to all of them in the scope of this article. Nevertheless, for a general presentation of European research, it is useful to consult, *van Hoecke* [33], p. 483, who presents the different research groups throughout Europe and the research undertaken in this field; *Röttinger* [27] for a very extensive bibliography. See also the publications of the Academy of European Law (ERA) in Trier: *Barrett/Bernardeau* [1]; *Heusel/Fuchs* [15].

[2] *Reich* [25]; *Staudenmayer* [31]; *Hesselink* [14]; *Schmidt-Kessel* [28]. See also Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, p. 3.

[3] Former steps include, *The Hague Programme* Strengthening Freedom, Security and Justice in the European Union, (14292/1/04 REV 1 Annex 1), p. 41. This programme said explicitly (point 3.4.4): "In matters of contract law, the quality of existing and future community law should be improved by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a common frame of reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union." See also the *Council* Resolution on "A more Coherent European Contract Law", OJ C 246 of 14 October 2003, p. 1; Council conclusions at the (Competitiveness) Council on 29 November 2005 on the European Contract Law Project and the Review of the Consumer *Acquis*, Doc. 15322/05. *European Parliament*: Resolution of 26 May 1989 on Action to Bring into Line the Private Law of the Member States, OJ C 158 of 26 June 1989, p. 400; Resolution of 6 May 1994 on the Harmonization of Certain Sectors of Private Law of the Member States, OJ C 205 of 25 July 1994, p. 518; Resolution of 15 November 2001 on the Approximation of the Civil and Commercial Law of the Member States, OJ C 140 E of 13 June 2002, p. 538; Resolution of 23 March 2006 welcoming the First Progress Report and expressing support for the CFR Project (European Parliament resolution on European contract law and the revision of the acquis: the way forward, P6_TA(2006)0109); Resolution of 7 September 2006 expressing support for the preparation of a wide CFR project covering general contract law issues and not only consumer contract law (European Parliament resolution on European contract law, P6_TA(2006)0352). Many acts from the *European Commission*: Communication on European Contract Law of 11 July 2001: What Future for European Contract Law?, OJ C 255 of 13 September 2001, p. 1; A more Coherent European Contract Law – An Action Plan, OJ C 63 of 15 March 2003, p. 1; European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, OJ C 14 of 20 January 2005, p. 6; First Annual Progress Report on European Contract Law and the *Acquis* Review, COM (2005) 456 final; Second Progress Report on the Common Frame of Reference, COM (2007) 447 final.

[4] *Lando* [20], p. 127.

[5] *Weatherhill* [35]; id. [36]; id. [37]; *Hesselink* [14], p. 402. For a very extensive and clear study, *Smits* [30].

Numerous actors are involved in the project,[6] and playing the main part, the Joint Network on European Private Law (CoPECL)[7]. This network encloses, in particular,[8] the Study Group on a European Civil Code[9] chaired by Professor Christian von Bar and the Research Group on the Existing EC Private Law, or "*Acquis* Group"[10] as well as the Trento Common Core Group. The Trento Common Core group[11] focuses on a functional approach requiring an unorthodox approach to legal concepts[12] and aiming only to describe legal issues,[13] whereas the Study Group and the *Acquis* Group aim at drafting a set of rules. Yet even though many researchers are working on drafting this academic common frame of reference for European contact law, the exact meaning of such a Common Frame of Reference (CFR) is imprecise.[14] Manifold discussions have been held[15] as to its purpose, content and scope.

[6] See also many similar projects such as the "European Casebook" project led by scholars at the University of Maastricht, *van Gerven* [32]. It is also necessary to distinguish the types of actors involved. *Röttinger* [27], p. 820 describes the "three instruments the Commission has put in place: research teams, CFR-net (made up of stakeholder experts), and a consultative group of Member States' experts".

[7] http://www.copecl.org. *Micklitz* [23], pp. 6–8 critizises this organisation and the methods used to find the CFR.

[8] Other members include (as stated on the web site of CoPECL): The Project Group on a Restatement of European Insurance Contract Law, or "Insurance Group"; The Association Henri Capitant together with the Société de Législation Comparée and the Conseil Supérieur du Notariat; The Research Group on the Economic Assessment of Contract Law Rules, or "Economic Impact Group" (TILEC – Tilburg Law and Economics Center); The "Database Group"; and The Academy of European Law (ERA).

[9] This group follows up from the former Lando Commission (Commission on European Contract Law). Information on this group can be found at http://www.sgecc.net/. The web site states "The Study Group on a European Civil Code is a network of academics, from across the EU, conducting comparative law research in private law in the various legal jurisdictions of the Member States" that aims "to produce a codified set of Principles of European Law for the law of obligations and core aspects of the law of property. The published principles will be complete with commentary and comparative notes".

[10] http://www.acquis-group.org/. The web site states: "the Acquis Group targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law." The Acquis approach also tends to give a European perspective to the rules by opposition to a simple comparison of the national systems throughout Europe as it is done in the Study Group: see *Schulze* [29], p. 732.

[11] http://www.jus.unitn.it/dsg/common-core/. See *Bussani/Mattei* [6]; id. [7], p. 340, intending to "unearth […] what is already common, if anything, among the different legal systems of European Union Member States […] in order to obtain at least the main lines of a reliable geographical 'map' of the law of Europe" and thus contribute to "building a common legal culture". This project does not aim at drafting legislation but only at finding similar solutions and rules in the existing law. *Lando* [21] stressing the functional approach of the Common Core methodology.

[12] *Lando* [21], p. 814.

[13] Summarizing the methodology: *Kötz* [19], pp. 804–805. See also *Bussani* [5] and *Gerber* [10].

[14] *Fuchs* [9]; *von Bar* [34], pp. 22–23, stressing a similarity with the American "restatement" documents, while not being identical to them. Further, a mere restatement would not be enough, it is necessary to formulate "best solutions"; *Zimmermann* [38].

[15] Council Resolution on "A more Coherent European Contract Law", OJ C 246 of 14 October 2003, p. 1.

1.2 The purpose of the CFR

Many opinions are voiced as to the purpose of the CFR. The Council explicitly holds[16] that "the frame of reference could be a "toolbox" for European legislators and possibly for domestic legislators as well".[17] The European Parliament seems to consider the frame of reference primarily as a preliminary stage towards a European Civil Code.[18] It understands the CFR as an instrument which could be chosen (opt in) or rejected (opt out) as the law governing a specific contract. The EU Commission aims first and foremost at the improvement of the quality of legislation and the coherence of the existing and future EC law in the area of contract law.[19] The Commission intends to use the CFR in the process of reviewing existing and preparing future sectoral, contract relevant EC *acquis*. In particular, the Commission confirms in its Second Progress Report as of 25th July 2007, the prioritisation of issues related to consumer contract law issues.[20]

Legal researchers state that their purpose of a CFR is to fill legal gaps where there is no specific national legislation relating to an issue, and thus create a body of international "soft law". Such international soft law generally serves the purpose, of not being constrained by the concepts or rules of a single legal system.[21] It thus provides suggestions[22] for the solution of questions not yet addressed by national legislators.[23] It can also be very useful for arbitrators who "look for rules that express general principles of law and are commonly accepted for international contracts"[24]. This is precisely the case for agency, franchise and distribution contracts, where there is only limited national legislation.[25] In this respect, the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts, could provide a useful model for national legislators. However, the exact content, effects, scope and structure of such a model remains to be determined.

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16) Note from the Presidency to the Council of the European Union on the Common Frame of Reference for European Contract Law, Doc. 8548/07, 17.4.2007. See also Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, p. 3.

17) See also *von Bar* [34], p. 23.

18) This has nevertheless been rejected by the Council in its conclusions of 29 November 2005, Doc. 15322/05, p. 4. See however the European Parliament Resolution of 7 September 2006 on European Contract Law in which it expresses support for the preparation of a wide CFR project covering general contract law issues and not only consumer contract law.

19) See in particular the Action Plan on "A more coherent European Contract Law", OJ C 63 of 15 March 2003, p. 1, n° 62: "[The Common Frame of Reference] should provide for *best solutions* in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as "contract" or "damage" and of the rules which apply, for example, in the case of the non-performance of contracts. Critics by *Hesselink* [14], p. 403.

20) Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, p. 2. See also the Green Paper on the Review of the Consumer *acquis* adopted by the Commission on 7 February 2007, OJ C 61 of 15 March 2007, pp. 1–23.

21) Yet *Micklitz* [23], p. 5, questions whether it will be possible to combine the results of the research of the Study Group with those of the Acquis Group and with mandatory consumer law.

22) *Bussani/Mattei* [7], p. 348, stress that "The choice of a soft-law approach, however, does not eliminate the prescriptive nature of these projects: the change of the existing law has to be attained by indirect means, but the final aim remains legal change".

23) *Bennet* [2], p.771.

24) *Lando* [21], p. 812.

25) For example, the French Law Doubin (Loi n° 89-1008 du 31 déc. 1989).

1.3 The scope and effects of the CFR

Many options remain open, ranging from general guidelines for legislators to detailed model provisions that could even be used by citizens and companies. The Council states in June 2007,[26] that the scope of the CFR needs to be defined by choosing one of the following options: (1) restricting the scope of the Common Frame of Reference to Community consumer contract law; (2) limiting the Common Frame of Reference to general contract law, whereby consumer contract law would remain a special matter or (3) covering the whole of contract law, including consumer contract law.

Moreover, the legal effect of the frame of reference is not yet determined. The Council thus questions[27] "whether the frame of reference should be without binding effects or whether it should have a certain impact in the sense that reasons must be given if such guidelines are not applied". In the June 2007 note, the Presidency of the Council[28] suggests to discuss three options: (1) a non binding CFR; (2) a CFR with some binding elements, for example the principles and the definitions, but not the model provisions. The European legislators would then have to undertake to take these principles and definitions into account when drafting new legislation; (3) or the entire Common Frame of Reference would be a legal instrument or an inter-institutional agreement, which means that it would not be possible to derogate from it or that reasons would have to be given in case of any such derogation. However, the Commission reminds in its Second Progress Report as of 25th July 2007 that the CFR "*would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified. Its scope is not a large scale harmonisation of private law or a European civil code*".[29]

1.4 The content of the CFR

The content of the common frame of reference is unclear, as here again many options are still open. According to some opinions,[30] the CFR could just cover the analysis of

[26] Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, pp. 5–7.

[27] Note from the Presidency to the Council of the European Union on the Common Frame of Reference for European Contract Law, Doc. 8548/07, 17. 04. 2007, p. 3. Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, pp. 3–4.

[28] Note from the Presidency to the Council of the European Union on the Common Frame of Reference for European Contract Law, Doc. 8548/07, 17. 4. 2007, p. 3. Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, p. 10.

[29] See also *Staudenmayer* [31], p. 97: "common principles, common definitions and model rules". *Hesselink* [14], p. 401: "it is unclear whether a CFR is a list of common terminology or a legal dictionary [… or] a normative device, i.e. a set of common *rules* of contract law which are meant to have some sort of legal force (*Geltung*) after their publication by the Commission".

[30] The EU Commission seems to be going this way at the present time stating that "it would prioritise the CFR work on issues related to consumer contracts", see Second Progress Report on the Common Frame of Reference, 25 July 2007, COM (2007) 447 final, p. 2.

eight Directives in the area of consumer law.[31] Other opinions[32] would like it to extend to general principles of civil contract law which are present in legal instruments in the area of consumer contract law, or even more generally to all areas of civil contract law, for example also to contracts between companies. Some authors nevertheless consider that "the true area of the European principles […] will always be cross-border commercial transactions in the European Union; parties may however prefer a reference to the UNIDROIT principles which seem to be well appreciated and recognised in international commercial arbitration"[33].

In the June 2007 note,[34] the Presidency of the Council suggests that the Committee on Civil Law Matters discuss the following options: (1) drafting a systematic collection and compilation of national legal principles; (2) consolidating European contract law developed so far; (3) creating a systematic collection and compilation of national legal principles and existing European contract law.

The European Commission intends it to include essentially three elements.[35] First of all, the CFR should provide a list of common principles, stating for example, the principle of contractual freedom or the principle of the binding force of contract, with their exceptions such as the application of mandatory rules and of the right of withdrawal. Second, the CFR should encompass common definitions of basic concepts such as contract, damages, time of conclusion of contract and so forth. Finally, the CFR should state common rules.[36]

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[31] Consumer directives under review: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372 of 31 December 1985, p. 31; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158 of 23 June 1990, p. 59; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 of 21 April 1993, p. 29; Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280 of 29 October 1994, p. 83; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144 of 4 June 1997, p. 19; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80 of 18 March 1998, p. 27. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166 of 11 June 1998, p. 51; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171 of 7 July 1999, p. 12.

[32] See The Hague Programme Strengthening Freedom, Security and Justice in the European Union, (14292/1/04 REV 1 Annex 1) p. 41. Also, Second European Discussion Forum held in Vienna on 26 May 2006: cited by Second Progress Report on the Common Frame of Reference, 25th of July 2007, COM (2007) 447 final, p. 9 and also European Parliament Resolution of 7 September 2006 expressing support for the preparation of a wide CFR project covering general contract law issues and not only consumer contract law.

[33] *Reich* [25]; *Bonell* [3], p. 36, opposing "European *lex mercatoria*" to a "global" *lex mercatoria* or "*lex mercatoria tout court*".

[34] Note from the Presidency to the Committee on Civil Law Matters (General Questions), Doc. 10235/07, 07.06.07, p. 9.

[35] Communication from the Commission to the European Parliament and the Council: A more Coherent European Contract Law – An Action Plan, OJ C 63 of 15 March 2003, p. 1, n° 62. European Contract Law and the Revision of the *acquis*: the Way Forward, COM (2004) 651 final, p. 3, OJ C 14 of 20 January 2005.

[36] *Pozzo* [24]; *Rossi/Vogel* [26]; *Brower/Hage* [4]. Also *von Bar* [34], p. 23, encouraging the "development of a terminology that is understood all over Europe".

Researchers specifically announce that *their* content of a CFR is to provide a model academic legislation project (the "Academic" CFR), a restatement, formulated from a "genuinely European perspective rather than from any national standpoint"[37] that needs to be discussed on a political level and democratically, but that aims to become a European Civil Code,[38] after "a – not unduly long – transitional period prior to the enactment of the Code" [39].

1.5 The general structure of the CFR

The general structure of the CFR as laid out in 2005 by the Network of Excellence 'Common Principles of European Contract Law' set under the Sixth Research Framework Programme of the EU, covers:[40] Fundamental Principles of Contract Law, Contracts and Other Juridical Acts, Contractual and Non-contractual Rights and Obligations, Specific Contract Types, Benevolent Intervention in Another's Affairs, Non-contractual Liability for Damage, Unjustified Enrichment, Transfer of Movables, Security Rights in Movables, Trusts and a Annex of Relevant Terminology and Definitions of Terms. Agency thus appears in the Model Rules in Chapter 3.

Yet this structure is not the same as the one published in the CFR 2004 Commission Communication,[41] and is very likely to change during the drafting of the CFR, as many issues, specifically borderline issues (such as the relationship between contract law and property law[42]) had not been identified in 2005.

Franchise and distribution contracts are not specifically addressed in the CFR 2004 Commission Communication or in the 2005 Structure proposed by the Network of Excellence 'Common Principles of European Contract Law'. Only agency is covered by the projects, however only in relation to its external effects. Additionally, in the European Commission's Second Progress Report as of 25th July 2007, general contract law is not seen as a priority even though some specific issues in relation to agency were mentioned. In particular, the need for a common terminology was stressed such as defining clearly the terms of "agent" and "representative" in the CFR. Additionally, the distinction between direct and indirect representation was discussed, the Second Progress Report[43] stating that "only a direct representative can bind the principal, as he acts "*in the name of* " the principal, whereas an indirect representative acts "*on behalf o*f " the principal.

[37] *Lando* [20], p. 130.

[38] Opposing the idea of a European Civil Code because of diverging legal traditions and cultures throughout Europe: *Micklitz* [23], p. 3, yet stating that the CFR should include the *acquis communautaire* and consumer law. Stressing the need for political decisions on choices to be made (policy questions): *Hesselink* [12]. See also *Lurger* [22].

[39] *Lando* [21], p. 130; *Bonell* [3], p. 37; *Kötz* [19].

[40] For a detailed table of contents, See *von Bar* [34], spec. pp. 25–26.

[41] European Contract Law and the Revision of the *Acquis*: the Way Forward, 11. 10. 2004, COM (2004) 651 final, Annex 1.

[42] On 8 June 2007 a conference was organised in Maastricht by Professor van Erp on the CFR and Property Law showing the *lacunae* of the current projects. The contents of this conference should be published in 2008.

[43] Second Progress Report on the Common Frame of Reference, 25 July 2007, COM (2007) 447 final, p. 8.

Notwithstanding this situation, there are Principles of European Law (PEL) relating to these contracts and also a Draft CFR (DCFR) since September 2007.[44] Both texts are very similar, as the Draft CFR is directly inspired by the Principles. This article is going to focus on the Principles and will show how The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)[45] go much further than formulating a simple common terminology. The following article will thus first present the General Structure and Content of the PEL CAFDC/DCFR (2), then show its Relationship to other Soft and Hard Law Instruments (3) and finally discuss some of the Duties/Obligations found in the PEL CAFDC/DCFR (4).

2. Structure and Content of the PEL CAFDC/DCFR

2.1 Scope of the Principles on Agency, Franchise and Distribution Contracts

The scope of the Principles on Agency, Franchise and Distribution Contracts (Article 1:101: Scope) is defined both by a *legal qualification* covering commercial agency, franchise and distribution contracts, and by a *factual qualification* in respect to other contracts where one party, engaged in business independently uses its skills and efforts to bring another party's products on to the market. As this article is a scope rule, the parties cannot by their agreement classify their contract as an agreement that doesn't fall under these Principles, if this contract fulfils either the legal or the factual qualification. The Principles apply only to commercial contracts between merchants, meaning contracts between a professional principal, supplier, franchisor, agent, distributor or franchisee, that do not need any specific protection in addition to the general protection which general contract law provides to any party to any contract.[46] In particular, a commercial agent is an independent entrepreneur acting in the name of his principal, selling the principal's products; whereas a franchisee or a distributor act in their own names selling their own products. The concept of independent business person includes both natural and legal persons. It excludes employees and advertisement contracts, as in an advertisement contract, one party endeavours to bring another party's products to the market, yet this endeavour is indirect as the first party does not try to sell the product themselves. An employee is not an independent business person.

All contracts falling within the scope of PEL CAFDC have the same economic function of bringing products (goods and services) to the market[47] and are, in general, vertical agreements, i.e. "agreements between economic actors on different levels in the production and distribution chain".[48] They represent long-term relationships and have a strong relational character where success depends on loyal and intense cooperation.

[44] As the Draft CFR and its numbering is likely to be changed before its final publication in March 2008, we only refer here to the articles of the PEL CAFDC as published by *Hesselink* [13].
[45] *Hesselink* [13].
[46] See Article 4:109 PECL (Excessive Benefit or Unfair Advantage) and Article 4: 110 PECL (Unfair Terms not Individually Negotiated).
[47] *Hesselink* [13], p. 91.
[48] *Ibid*.

2.2 Content of the Principles

The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC) look at the internal relationship of the two professionals involved. This is new, as in most uniform and international texts only the external relationship is regulated.

For example, in the Principles of European Contract Law (PECL), article 3:101 relating to the scope of Chapter 3 on the authority of agents, excludes in paragraph 3 the internal relationship between the agent or intermediary and its principal. In this respect, PECL focuses on the external aspects of agency law, and considers internal aspects only when these aspects impact on the external relationship towards third parties.[49] This is the case, for example, of termination of authority as between the agent and the principal (internal relationship), which is also effective against third parties (external relationship).[50]

On the contrary, the Principles (PEL CAFDC) do not deal with external relationships towards third parties. Any question relating to the authority of an agent to act for the principal is to be found in Chapter 3 PECL (Authority of Agents). For this reason, these Principles do not deal with any questions of liability towards third parties[51] nor with any kind of liability between members of a same network (agents, franchisees or distributors who suffer commercially by a discredit to a brand or trademark, from the behaviour of a co-agent, co-franchisee or co-distributor).

Concentrating only on the internal relationship between parties, they aim to protect the other "weaker" or "relying" party by imposing information duties. The principles take into account, in an indirect way, the fact that there is often a strong discrepancy in bargaining power between the parties: global network of agents, franchisees or distributors vs. SME's.[52] Many rules are mandatory, and even some default rules contain duties in the interest of the commercial agent, the franchisee and the distributor. Yet most rules are default rules the parties are free to deviate from. In this respect, the PEL CAFDC include many pre-contractual mandatory information duties for the principal, supplier, and franchisor.[53]

The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts aim to uphold a long term relationship. Many of the provisions are to be construed with this in mind. Good faith rules are of paramount importance in the performance of the contract, requiring, in particular, the parties to "collaborate actively and loyally and to coordinate their respective efforts in order to achieve the objectives of the contract.[54] The rule of reasonableness is also very important. For

[49] *Bennet* [2], p. 772. The same is to be said about PICC (2004), see infra.
[50] *Bennet* [2], p. 790.
[51] See for example, the recourse of a consumer against the franchisor or the supplier in the case of a defective product: Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210 of 7 August 1985, p. 29.
[52] *Hesselink M*., SMEs in European Contract Law, Background Note for the European Parliament on the Position of Small and Medium-sized Enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the Review of the Consumer *Acquis*, 5 July 2007, p. 14: targeting SMEs as weaker parties to a commercial contract.
[53] However, the current draft of the CFR has deleted many of these mandatory rules.
[54] PEL CAFDC, Art. 1:202: Co-Operation.

example, when concluding the contract the other party must be able "to decide on a reasonably informed basis",[55] or when terminating the contract, the party wishing to terminate the relationship must give the other party notice of reasonable length (mandatory rule),[56] pay a reasonable indemnity for goodwill[57] or repurchase the remaining stock, spare parts or materials at a reasonable price.[58]

As an special feature, the PEL CAFDC also stress the importance of intellectual property rights in franchise contracts, whereas such rights are secondary in the other two contracts.

2.3 The Structure of PEL CAFDC

The Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC) comprise four chapters: Chapter 1 contains general provisions applicable to the three types of contracts, Chapter 2 to 4 relate in turn to each specific contract.

In Chapter 1 PEL CAFDC (General provisions) there are 13 articles subdivided into 4 sections: Scope, Obligations, Ending and Termination and Other General Provisions. These provisions apply to all commercial agency, franchise and distribution contracts. These general rules are to help avoid litigation on the qualification of the contract[59] by providing common rules or specific rules based on the same policy.

Chapter 2 PEL CAFDC is dedicated to commercial agency – with 19 articles subdivided into 3 sections: Scope, Obligations of the Commercial Agent and Obligations of the Principal. Art. 2:101 defines the scope of commercial agency within these principles. A commercial agency contract is a contract under which one party (the commercial agent) agrees to act on a *continuing basis* as a *self-employed intermediary* to negotiate or to conclude contracts *on behalf of another party* (the principal) and the principal agrees to *remunerate* the commercial agent for the commercial agent's activities.[60] Through this contract, the commercial agent accepts certain obligations.[61] These include the duties to negotiate and conclude contracts on behalf of the principal (Art. 2:201), to follow the principal's reasonable instructions (Art. 2:202), to inform the principal on contracts concluded during performance (Art. 2:203) and to maintain accounts related to the contracts concluded on behalf of the principal (Art. 2:204). The principal accepts the entitlement of the agent to a commission during and after the contract (Art. 2:301 to art. 2:306), to inform the agent during the contract on the characteristics of the goods or services, on the sales conditions and on the performance of the contracts concluded (Art. 2:307 to Art. 2:308), to warn the agent of a decreased volume of contracts the principal will be able to conclude or perform (Art. 2:309), to perform accounting duties

[55] PEL CAFDC, Art. 1:201: Pre-Contractual Information.
[56] PEL CAFDC, Art. 1:301: Unilateral Ending of a Contract for an Indefinite Period.
[57] PEL CAFDC, Art. 1:305: Indemnity for Goodwill.
[58] PEL CAFDC, Art. 1:306: Stock, Spare Parts and Materials.
[59] *Hesselink* [13], p. 95.
[60] See also the Agency Directive: Directive of 18 December 1986 relates to the Coordination of the Laws of Member States relating to Self-Employed Commercial Agents (86/653/EEC).
[61] The list hereafter is only a very simplified version of the Principles. The duties are more detailed and more numerous in the full text of the articles.

related to the commission due to the agent (Art. 2:310 and Art. 2:311), and to pay an indemnity at the end of the contract (goodwill) (Art. 2:312). The principles also include a description of the so-called *Del Credere Clause* (Art. 2:313), whereby an agent guarantees that a customer will pay the price agreed to.

Chapter 3 PEL CAFDC covers franchise contracts within 13 articles subdivided into 3 sections: a General section, a section on the obligations of the Franchisor and a section on the Obligations of the Franchisee.

The General section, defines the scope of the contract (Art. 3:101) and specific pre-contractual information issues (Art. 3:102). The obligations of the franchisor include: granting the franchisee the right to use intellectual property rights and providing him with the necessary know how (Art. 3:201 to art. 3:202); providing the franchisee with assistance in the form of training courses, guidance and advice (Art. 3:203); supplying the products within a reasonable time (Art. 3:204); informing the franchisee during performance on sales conditions on the market and in respect to the products (Art. 3:205); warning the franchisee of decreased supply capacity (Art. 3:206); promoting and maintaining the reputation of the network (Art. 3:207). The franchisee must accomplish following obligations: pay the fees and royalties (Art. 3:301); inform the franchisor on any claims or infringements by third parties of the franchisor's intellectual property rights (Art. 3:302); follow the franchisor's business method and instructions (Art. 3:303); and allow inspection by the franchisor (Art. 3:304).

Chapter 4 PEL CAFDC relates to distribution contracts with 12 articles subdivided into 3 sections: a General section, a section on the Obligations of the Supplier and a section on the Obligations of the Distributor. The general section covers scope and definitions (Art. 4:101). The obligations of the supplier are to supply the products ordered by the distributor (Art. 4:201), inform the distributor during performance on sales conditions (Art. 4:202), warn the distributor of decreased supply capacity (Art. 4:203), provide advertising materials needed for the distribution (Art. 4:204), and uphold the reputation of the products (Art. 4:205). The distributor[62] must ensure distribution (Art. 4:301), inform the supplier on any claims or infringements by third parties of the supplier's intellectual property rights during performance (Art. 4:302), warn of decreased requirement (Art. 4:303), follow the instructions of the supplier (Art. 4:304), allow inspection by the supplier (Art. 4:305), and refrain from damaging the reputation of the products (Art. 4:306).

The PEL CAFDC published in 2006 are been discussed during the work on a European CFR. A draft CFR on Commercial Agency, Franchise and Distribution was published in September 2007.[63] As the work on the CFR is still ongoing and the final CFR will only published in March 2008, it is not possible to make any definite conclusions on the new text. Nevertheless, the following table shows some of the changes (in italics) that have been made to Chapter 1 of the PEL CAFDC and gives thus some insight on how the final CFR could look like.

Three main differences appear within this comparison. First, the Draft CFR has added some substance to the PEL CAFDC by including, in the text of the articles,

[62] Only exclusive and selective distribution contracts are mentioned in this section.
[63] Draft CFR: Book IV, Part E. Commercial Agency, Franchise and Distribution.

COMPARISON BETWEEN PEL CAFDC and DCFR	
PEL CAFDC: 13 articles	**DCFR (September 2007): 16 articles**
Chapter 1: General Provisions	
Section 1: Scope of Chapter 1 1:101:Scope	**Section 1: Scope** 1:101:Contracts covered *(2) In this part, "products" include goods and services.* *1:102: Exclusions* *This Part of this Book does not apply to contracts in so far as they are contracts for transport.* *Section 2: Other General Provisions* *1:201:Priority Rules* *1:202: Derogation*
	Chapter 2: *Rules applying to all Contracts within the Scope of this Part*
Section 2: Obligations 1:201: Pre-Contractual Information *(3) remedies for mistake under PECL* *(4) Parties may not derogate from this provision* 1:202:Co-operation *(2) Parties may not derogate from this provision* 1:203: Information during the performance *Parties may not derogate from this provision* 1:204 Confidentiality	**Section 1: Pre-Contractual** 2:101: Pre-contractual information duty *"so far as required by good commercial practice"* **Section 2: Obligations of the parties** 2:201: Co-operation 2:202: Information during the performance 2:203:Confidentiality
Section 3 Ending and Termination 1:301: Contract for a definite period *(1) Definition and principle of no unilateral ending* 1:302: *Unilateral ending of a* contract for an indefinite period ***(5) Typo: read paragraphs 3 and 4 (and not 2 and 3)*** 1:303: Damages for Non-Observance of Notice Period 1:304:Termination for non-performance 1:305: Indemnity for Goodwill 1: 306: Stock, spare parts and material	**Section 3: Termination of Contractual Relationship** 2:301: Contract for a definite period 2:302: Contract for an indefinite period (*2) restitutionary effects of termination* ***(7) Typo: read paragraphs 5 and 6 (and not 2 and 3)*** *(8) Reference to III-1:109 (variation or termination by notice)* 2:303: Damages for termination with inadequate notice 2:304: Termination for non-performance 2:305: Indemnity for Goodwill 2:306:Stock, spare parts and materials
Section 4: Other general provisions 1:401: Right of retention 1:402: Signed written document	**Section 4: Other general provisions** 2:401: Right of retention 2:402: Signed written document

some issues that were in the explanatory report.[64] Second, the Draft CFR has taken away the mandatory effect of certain provisions deleting the sentence "Parties may not derogate from this provision" such as in article 1:201 (Pre-Contractual Information), article 1:202: (Co-operation) and article 1:203 (Information during the performance). And finally, the draft CFR on CAFDC relies on other parts of the CFR to complete specific issues. See for example, article 2:302: (Contract for an indefinite period) that refers under point (8) to III-1:109 (variation or termination by notice), i.e. the general part of the CFR.

[64] *Hesselink* [13].

3. The relationship of PEL CAFDC/CFR to other soft and hard law instruments

Of all three contracts in these Principles, only the contract of agency has been extensively regulated both in international "soft law" and in classical international and European "hard law".

UNIDROIT produced a Model Franchise Disclosure Law in 2002, which lists in article 6, a very long list of information to be disclosed to the franchisee. This model law aims "to create a secure legal environment between all parties in a franchise arrangement"[65]. It focuses entirely on pre-contractual information duties. By comparison, the PEL DAFDC go further as they also cover aspects of the relationship between a franchisor and a franchisee during the performance of the contract.

There are no specific rules for distribution contracts,[66] even though the EU Commission has enacted a number of legal acts applicable in competition law that have effects on distribution contracts.[67]

3.1 Agency Franchise and Distribution Contracts in European, Private International Law and Uniform Law

3.1.1 Agency Franchise and Distribution Contracts in European Law

In primary European law, Art. 81 (1) [Ex Art. 85 (1)] TCE declares invalid all agreements and concerted practises which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Agency, franchise and distribution contracts are thus only taken into account by primary law in relation to competition law in general, focusing on their economic effects within the internal market.

The Council Directive of 18 December 1986 relates to the Coordination of the Laws of Member States relating to Self-Employed Commercial Agents (86/653/EEC).[68] Many elements of this directive can be found in the present principles, yet the implementation of this directive has lead to national differences between the Member States. This directive specifically defines the commercial agent, but both the definition of a commercial agent and the scope of application of agency differ from State to State. For example, some States only include within the scope of agency, contracts relating to the sale of goods (England, Finland and Sweden), whereas other States also include services (e.g. France, Germany, The Netherlands, Spain and Portugal).

More generally, distribution contracts are covered by two Regulations: the Commission Regulation 2790/1999 on vertical agreements[69] and hereto assorted Guidelines on Vertical Restraint and the Commission Regulation (EC) 1400/2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and

[65] Explanatory Report, Preface, n° 3.
[66] *Ferrier* [8].
[67] *Idot* [16].
[68] See ECJ cases in *Hesselink* [13], p. 94.
[69] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance) OJ L 336 of 29 December 1999, p. 21.

concerted practises in the motor vehicle industry.[70] – Yet here again, the aim of these regulations is more to protect fair competition (external effects) than protect the parties to a distribution contract.

3.1.2 Private International Law

In private international law, there is a specific Hague Convention on the Law Applicable to Agency (14 March 1978) that entered into force on the 1st of May 1992.[71] Articles 5 to 9 determine the law applicable to the relationship between agent and principal. This law is chosen by the agent and the principal (art. 5, 1). Article 6 provides for a fallback rule if the agent and the principal have not chosen a law applicable to their relationship. In this case, shall apply: the law of the State where the agent has his business establishment or the law of the State where the agent is primarily to act if the principal has his business establishment in this State. If either of the parties have more than one business establishment, one should look to the establishment with which the agency relationship is the most closely connected. This law governs in particular (art. 8): the formation and validity of the agency relationship, the obligations of the parties, the conditions of performance, the consequences of non-performance and the extinction of those obligations.

More generally, the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980)[72] provides rules for determining the law applicable to a contractual relationship. The parties are free to choose the law applicable to their relationship (art. 3). If they fail to do so, article 4 provides a default rule linking the contract to the country with which it has the closest connection (art. 4. par.1). This country is presumed to be that "country where the party which is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration" (Art. 4 par. 2)[73]. Agency and all forms on commercial contracts such as franchise and distribution contracts fall under the general rules of the Convention. Yet this Convention concentrates only on the internal effects of agency as it excludes in Article 1 (2) (f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporated, to a third party. In this respect, there is a similarity to the PEL CAFDC.

[70] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203 of 1 August 2002, p. 30.

[71] Entered into force 1st of May 1992. Contracting States: France, The Netherlands, Argentine and Portugal.

[72] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266 of 9 October 1980, p. 1; Report on the law applicable to contractual obligations by Mario Guiliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ C 282 of 31 October 1980, p. 1. This convention is currently being revised and transformed into a EC Regulation called "Rome I Regulation". Rules on agency are to be found in draft article 7.

[73] The only problem here is to define the performance characteristic of the contract. Whereas in agency, it is the performance of the agent, the situation is less clear in distribution and franchise contracts, where there are many obligations and it is not always possible to determine the centre of gravity of the contract (*Juenger* [17], p. 199).

3.1.3 Uniform Law

In Uniform Law, there is a UNIDROIT *Draft Convention on Agency in the International Sale of Goods* (Geneva, 17 February 1983) not yet in force.[74] However, many of the articles of this Convention have been used in the Principles of International Commercial Contracts (PICC 2004).[75]

3.2 Agency Franchise and Distribution Contracts in international 'soft' law

3.2.1 Agency Franchise and Distribution Contracts in the Principles of European Contract Law (PECL).

The relationship of PEL CAFDC to PECL is that of a *lex specialibus* in relation to a *lex generalibus*. The Principles of European Contract Law (PECL) provide general rules of contract that are applicable to all contracts regardless of their object or the status of the parties. The primary aim of PECL is to serve as a basis for a European Code of Contracts.[76] Many general rules of relevance to agency, franchise and distribution contracts are thus to be found in PECL. For example, rules on the general consequences of invalidity are to be found in PECL (Chapter 4, Articles 4:101 to 4:119). More specifically, relating to agency, one can also find rules on the authority of agents in PECL (Chapter 3, Articles 3:101 to 3:304).[77]

The Principles of European Law applicable to Commercial Agency, Franchise and Distribution Contracts provide specific rules for a limited type of contract. The aim of these specific rules is to ensure that the practitioners of these contracts possess a "reasonable degree of legal certainty"[78] in the formation and performance of such contracts.

Notwithstanding the different scope of both texts, PECL does not concentrate on the internal relationship between the agent or intermediary and its principal (Art. 3:101 par. 3). On the contrary, the PEL CAFDC only apply to the internal relationship between the agent and the principal. Additionally, PECL distinguishes in article 3:102 between direct[79] (section 2) and indirect representation (section 3). In cases of direct representation, the principal is bound as against the third party, whereas in cases of indirect representation, the legal relationship arises between the agent and the third party.[80] This distinction is not relevant for PEL CAFDC.

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74) *Hanish* [11].
75) *Bennet* [2], p. 789. Comparing the two texts: *Bonell* [3], p. 21.
76) *Lando* [21], p. 810.
77) See also PICC, Art. 2.2.1 to Art. 2.2.10. : *Bonell* [3], p. 21 and *Bennet* [2], p. 771.
78) *Hesselink* [13], p. 92.
79) PECL: Article 3:102: Categories of Representation
(1) Where an agent acts in the name of a principal, the rules on direct representation apply (Section 2). It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later.
(2) Where an intermediary acts on instructions and on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply (Section 3).
80) *Bennet* [2], p. 775.

3.2.2 Agency Franchise and Distribution Contracts in the UNIDROIT Principles of International Commercial Contracts 2004 – PICC (2004)[81]

In general, PICC[82] and PECL rules are similar, even though PICC were drafted on the one side for a very heterogeneous set of States, with a universal territorial scope whereas on the other side, PECL were drafted for European States that have more homogeneous market economies.[83] Yet the scope of both set of rules is different: PICC relate specifically to international commercial contracts with universal territorial scope. Professor Lando writes: "PICC are made for the world"[84], for "parties to an international commercial contract who intend to have their contract governed, not by a national legal system, but by 'general principles of law', the *'lex mercatoria'* or the like, and who wish to have their dispute, if any, settled by an arbitral tribunal rather than a state court"[85]. By contrast, the PECL are formally limited to the member States of the European Union.[86] They are conceived to eventually become a European Contract Code or part of a European Civil Code, which will bind courts in the EU[87] and thus are "intended to apply to all kinds of contracts, including transactions of a purely domestic nature and those between merchants and consumers"[88]. Additionally, PICC are business related, whereas PECL is a pure academic work, not well known to the business community.[89]

In the agency contract, PICC, like PECL, only concentrate on the external relationship between the principal or the agent on the one hand and the third party on the other (Art. 2.2.1 par. 2)[90], whereas PEL CAFDC covers the internal relationship between parties. The situation in PICC is understandable, as general rules of *lex mercatoria*[91] also only discuss the external relationship between the principal or the agent on the one hand and the third party on the other.

PICC[92] also distinguishes between agency disclosed[93] and agency undisclosed[94].

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81) Unidroit Principles of International Commercial Contracts 2004.
82) *Bonell* [3], *Jung* [18].
83) *Lando* [20], p. 124.
84) *Ibid*., p. 123.
85) *Ibid*.
86) Art. 1:101 PECL: "These Principles are intended to be applied as general rules of contract law in the European Union"; *Bonell* [3], p. 33.
87) *Lando* [20], p. 123.
88) *Bonell* [3], pp. 32 and 34.
89) *Ibid.*, p. 35.
90) *Ibid.*, p. 20.
91) http://www.tldb.net/. CENTRAL List of *lex mercatoria* principles, rules and standards.
92) *Bonell* [3], p. 21. This is also the case in English law, see *Bennet* [2], p. 780.
93) PICC: Article 2.2.3 – Agency disclosed
(1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the relations between the principal and the third party and no legal relation is created between the agent and the third party.
(2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.
94) PICC: Article 2.2.4 – Agency undisclosed
(1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.
(2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

This is not relevant in the PEL CAFDC or in PECL. If agency is undisclosed, the agent is bound to the third party, whereas, if the agency is disclosed, the principal is bound to the third party.[95] The Working group on PICC (2004) specifically rejected the distinction between direct and indirect representation considering that it lacked legal certainty in a commercial relationship,[96] as "what really matters from an economic point of view is whether the third party knows or ought to have known that the person with whom it is contracting has the authority to act, and actually acts, not in its own interest but in that of another person"[97].

3.2.3 PEL CAFDC and the European Contract Code (Gandolfi Project)

Agency can be found under articles 60 and following of the Gandolfi European Contract Code. These provisions only concentrate on the external effects of agency, i. e. in which cases the principal is bound to the third party. They also only discuss disclosed agency.[98] Their content is therefore substantially very different from PEL CAFDC.

4. Duties/obligations found in the PEL CAFDC/DCFR

Three types of duties appear in the Principles: Pre-contractual duties; relationship duties; and duties related to termination of the Contract.

4.1 Pre-contractual duties

All three contracts include pre-contractual duties which can be found in the general part, additionally pre-contractual duties are reinforced for franchise contracts.

4.1.1 Pre-contractual duties in the general part

Under Article 1: 201 (Pre-contractual Information) each party *must* (mandatory provision) provide the other party with adequate information a reasonable time (timely) before the contract is concluded. This article aims to ensure that each party will have the relevant information in order to commit itself with full knowledge of the relevant facts.

Adequate information means information which is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter the contract of the type and under the terms under consideration. Remedies for breach of this duty

[95] *Bennet* [2], p. 776.
[96] *Ibid.*, p. 777.
[97] *Bonell* [3], p. 21.
[98] Art. 60. Contrat conclu par le représentant
1. Le contrat conclu par un sujet autorisé par l'intéressé à agir au nom de celui-ci et pour son compte produit directement ses effets vis-à-vis du représenté lui-même si le représentant a agi dans les limites des pouvoirs qui lui ont été conférés et si le tiers qui a conclu le contrat a eu connaissance du rapport de représentation.

are to be found within the remedies for mistake under PECL Chapter 4: Art. 4:103 (Mistake as to Facts or Law) and 4:107 (Fraud).[99]

Depending on the type of contract and branch of trade, the required information may include, "information regarding one's own company and experience, intellectual property rights which are involved, particular features of the commercial sector, market conditions, the structure and extent of the network, remuneration and fees, the terms of the contract".[100]

Additionally, each party is entitled to receive from the other, on request, a signed written document setting out the terms of the contract (Article 1:402).

4.1.2 Pre-contractual duties in the specific parts

There are no specific pre-contractual duties for the agency contract or the distribution contract, whereas pre-contractual information is paramount for the franchise contract (Art. 3:102). This information is provided from the franchisor to the franchisee, and it includes information on: the franchisor's company and experience, the relevant intellectual property rights, the characteristics of the relevant know how, the commercial sector and the market conditions, the particular franchise method and its operation, the structure and the extent of the network, the fees, royalties or any other periodical payments, the terms of the contract.

4.2 Relationship duties

Relationship duties are essential in these contracts. They are stated both in the general chapter and in the specific chapters.

4.2.1 In the general part

Cooperation (Article 1:202: Co-Operation) between the parties is an essential feature of the contracts. In commercial agency, franchise and distribution contracts and in other long-term commercial contracts the obligation to cooperate (see also, art. 1:202 PECL) is fundamental and particularly intense. It requires the parties in particular to collaborate actively and loyally and to co-ordinate their respective efforts in order to achieve the objectives of the contract. This is a mandatory provision.

This cooperation takes many forms. It features mandatory information duties during performance (Article 1:203). During the contract each party must provide the other *in due time* with *all the information* which the first party has and the second party needs in order to achieve the objectives of the contract.

It includes mandatory confidentiality duties (Article 1:204). A party which receives confidential information from the other must keep such information confidential and

[99] Art. 4:107 (3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
(a) whether the party had special expertise;
(b) the cost to it of acquiring the relevant information;
(c) whether the other party could reasonably acquire the information for itself; and
(d) the apparent importance of the information to the other party.

[100] *Hesselink* [13], p. 104.

must not disclose the information to third parties *either during or after the end* of the contract period. A party who receives confidential information from the other must not use such information for other purposes than the objectives of the contract.

Is not considered confidential information: any information that a party already had in its possession, or which has been disclosed to the general public and any information which must necessarily be disclosed to customers as a result of the operation of the business.

4.2.2 In the specific parts

In the specific parts, the duties arising from the relationship between the parties are numerous. They include supply and accounting duties,[101] general information duties[102] and specific information duties[103] of a party to inform the other party of certain events during the performance. In all contracts there are cooperation duties, both general[104] and specific.[105]

4.3 Rules on Termination

Termination rules are particularly important in these contracts, and have been given a lot of care as termination[106] may have important economic consequences both for the principal, franchisor and supplier as for the agent, franchisee and distributor.[107]

A contract for a definite period (Article 1:301) "ends upon the expiry of the period determined by the contract. Unless the parties agreed otherwise, such a contract cannot be ended unilaterally beforehand. A party is free not to renew a contract for a definite period. Yet if the other party has given notice in due time that it wishes to renew the contract, the refusal to renew must be given within a reasonable time before the

[101] That can be found in the agency contract (Art. 2:204 for the agent, and Art. 2:310 and Art. 2:311 for the principal); in the franchise contract (Supply by franchisor: Art. 3:204) and in the distribution contract: (Supply: Art. 4:201 – Distribution: Art. 4:301).

[102] See agency: (Art. 2:203, information by the agent; Art. 2:307 to Art. 2:308 information by the principal); franchise: Information by franchisor during performance (Art. 3:205); distribution: Information by supplier during performance (Art. 4:202); Information by distributor during performance (Art. 4:302).

[103] See the information on decreased volume: in agency contracts: Warning by the principal of the decreased volume of contracts (Art. 2:309); franchise contracts: Warning by franchisor of decreased supply capacity (Art. 3:206); in distribution contracts: Warning by supplier of decreased supply capacity (Art. 4:203) – Warning by distributor of decreased requirement (Art. 4:303).

[104] See agency contracts: follow the principal's reasonable instructions (Art. 2:202); franchise contracts: assistance by the franchisor (Art. 3:203); distribution contracts: protect reputation of the products (Art: 4:205).

[105] See agency contracts: provide information during performance (Art: 2:203); franchise contracts: information by franchisee on use of IP rights (Art. 3:302) – transfer by franchisor of intellectual property rights/know how (Art. 3:201 to art. 3:202) – use by franchisee of business method and instructions (Art. 3:303) and right of inspection by the franchisor (Art. 3:304) – promotion by franchisor of the reputation of the network (Art. 3:207); distribution contracts: advertising materials to be provided by the supplier (Art. 4:204) – reputation of the products not to be damaged by the supplier (Art. 4:205) – instructions to be followed by the distributor (Art. 4:304) – reputation of the Products not to be damaged by the distributor (Art. 4:306) – right of inspection by the supplier (Art. 4:305).

[106] Terminology is still discussed within the CFR drafting group: the choice is still open between the words "termination" and "ending", as these may have different legal effects in member States' law.

[107] An extensive commentary of these clauses is not possible here and we will limit this presentation to the general issues covered by these clauses.

expiry of the contract period. A contract for a definite period which continues to be performed by both parties after the contract period has expired becomes a contract for an indefinite period."

Either party may end a contract for an indefinite period (Article 1:302) by giving notice of reasonable length (art. 6:109 PECL). A notice of reasonable length depends among other factors on: the time the contract has lasted; reasonable investments made; the time it will take to find a reasonable alternative and usages. A notice period of one month for each year during which the contract has lasted, with a maximum of 36 months, is presumed to be reasonable. There is a minimum mandatory notice period for the supplier, franchisor or principal: 1 month the first year, then an extra month per year until 6 months for the sixth year and every subsequent year. Longer notice periods are possible by agreement, if the agreed period to be observed by the principal, franchisor or supplier is no shorter than that to be observed by the other party. The aggrieved party is not entitled to specific performance of the contract during the notice period. However, the court may order specific performance of contractual and post-contractual obligations which do not depend on co-operation.

The aggrieved party is entitled to damages for non-observance of the notice period (Article 1:303). The damages correspond to the benefit which the aggrieved party would have obtained during the non-observed period of notice. The yearly benefit is presumed to be equal to the average benefit which the aggrieved party has obtained from the contract during the previous 3 years or, if the contract has lasted for a shorter period, during that period. The general rules on damages for non-performance (art. 9:501 PECL) apply accordingly.

A party may terminate the contract for non-performance (Article 1:304), but only if the other party's non performance is fundamental within the meaning of Article 8:103 (b) and (c) PECL (art. 9:301 PECL).

When a contract comes to an end for any reason (including termination by either party for non performance), a party is entitled to an indemnity from the other party for goodwill (Article 1:305) if and to the extent that: the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business. The grant of an indemnity does not prevent a party from seeking damages under Article 1:303 (damages for non-observance of the notice period).

If the contract is ended, terminated or avoided by either party, the principal, franchisor or supplier must repurchase the agent's, franchisee's or distributor's remaining stock, spare parts and materials at a reasonable price, unless these can be resold (Article 1:306).

In order to secure its rights to remuneration, compensation, damages and indemnity, the commercial agent, franchisee or distributor has a right of retention over the movables which are in its possession, until the (former) principal, franchisor or distributor has fulfilled its obligations (Article 1:401).

5. Conclusions

These Principles represent the first "transnational" instrument focussed on the internal aspects of vertical agreement relationships. They translate a new policy in

commercial contracts by protecting the "relying" (but not necessarily) weaker party by ensuring adequate information before concluding the contract and during performance.

These principles show an economic approach to an "economic legal situation". By doing so, they enable a balance between the fundamental principles of freedom of contract and freedom of commerce on the one hand and the protection of the "relying" party on the other hand. The Principles provide many mandatory rules to ensure this, even though the final version of the CFR may delete these mandatory obligations, relying thus more on the balance of party interests in the commercial negotiations. The Principles however create the legal framework for a long-term contractual relationship by bringing a new non-legal approach to contracts where there is no competition or contradiction (other than financial) between the interests of the parties.[108] This non-legal approach should in any case stimulate the business community's interest in these Principles.

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